Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1618

L. C. COOK - - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

L. C. Cook - - - - - - - *Petitioner*

v.

United States of America - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (Appendix, hereinafter Ap., pp. 2a-18a) is reported at 512 F. 2d 637.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1975. A petition for rehearing was denied on May 22, 1975. The jurisdiction of this Court is invoked through 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I

In the criminal trial of twenty-four defendants together, did the trial court err and deny the petitioner a fair opportunity to participate in the selection of the

jury by allowing the petitioner, whose interests were in conflict with the other twenty-three defendants, only one peremptory challenge; and is the discretion allowed district courts in allotting peremptory challenges in multiple-defendant trials too broad and unbridled to insure reasonable uniformity of criteria for the effective participation by the parties in the selection of juries for trials of federal criminal cases?

II

In affirming the district court's refusal to sever petitioner from the joint trial of twenty-four defendants and the consequential disregard of petitioner's rights to fair trial and effective voice at trial, did the Court of Appeals sanction departure from the acceptable course of judicial proceedings so far as to call for exercise of this Court's power of supervision?

STATUTES AND RULES INVOLVED

Title 18 United States Code, Section 371:

Conspiracy to commit offense or to defraud United States:

If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only,

the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 United States Code, Section 2312:

Transportation of stolen vehicles:

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

Title 18 United States Code, Section 2313:

Sale or receipt of stolen vehicles:

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure

Rule 24.

Trial Jurors

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it

deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Rule 14.

Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a serevance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT

The petitioner, L. C. Cook, was convicted by a jury in the United States District Court for the Western District of Kentucky, Bowling Green Division, upon the charge of conspiracy (18 U.S.C. § 371) to violate the provisions of the Dyer Act (18 U.S.C. §§ 2312 & 2313).

The judgment of the district court was entered upon receipt of the jury verdict after an eight-week trial beginning on April 2, 1973. The trial was upon the charges contained in Count I (the conspiracy count) of a twenty-five count indictment. The remaining counts, all charging substantive violations of the Dyer Act, were severed by the district court for trial later. Petitioner was named only in the conspiracy count of that indictment.

Twenty-seven persons were named as defendants in the conspiracy count of the indictment (and there were 13 named, unindicted co-conspirators). Twenty-four, including petitioner, of course, went to trial. Three defendants were found not guilty by the jury, one secured a judgment of acquittal, and nineteen were convicted (See Opinion of Court of Appeals, Appendix [Hereinafter, Ap.] pp. 2a-3a).

The petitioner was sentenced to serve two years in the penitentiary and pay a fine of $5,000.00 (Judgment, Ap., pp. 19a-20a).

Over six months prior to trial and on other occasions up to and including the first day of trial peti-

tioner moved for a severance, a separate trial, strenuously asserting conflicts of interest and circumstance with all other named defendants, pointing to the confusion of issues and economic burdens which would flow from the trial of all defendants jointly, and complaining that in such a multiple-defendant marathon he would be deprived of the fair number of peremptory challenges of prospective jurors which would automatically be his were he tried alone.

The motions were overruled.

At the time the district court overruled petitioner's original motion for a severance, it also ruled that "the defense" would be allowed twenty-four peremptory challenges; that is, each defendant was given one strike in the selection of the jury. The prosecution was allotted the six strikes decreed by Rule 24(b) of the Federal Rules of Criminal Procedure.

The petitioner promptly and continually objected to this limitation, re-asserting the conflicts between his defense and those of the other defendants. The objections were overruled.

The selection of the jury was begun on the morning of the first day of trial. It was completed at 6:55 p.m. on the third day; and the jury was "sworn in" on the morning of the fourth day (Trial Order, 1st week, pp. 1-6).

At one point during the *voir dire* by petitioner's trial counsel a dispute arose between counsel and no less than three prospective jurors relative to the question of whether the testimony of a witness shown to be a liar in one instance should be disregarded in full

(Transcript of Evidence [Hereinafter, Tr.] Vol. 2, pp. 309-313).

Throughout the *voir dire* by the several counsel for the twenty-four defendants, conflicts in requests for challenges for cause surfaced, and objections to questions put to the prospective jurors by various defense counsel were voiced by attorneys for other defendants (See Trial Order, 1st week, pp. 4-5). Requests for additional peremptory challenges as the period of *voir dire* ended were denied (*Id.*).

During the eight-week trial hundreds of witnesses were called to prove the charges in the indictment. The transcript of evidence constitute sixty-two volumes, and there are eight trial orders—one for each week—plus the multitude of pre-trial motions, orders and records of proceedings.

The transcript of the evidence and proceedings *for and against* this petitioner, while disjointed at trial, consume about one-half of one of those sixty-two volumes.

From the start, and throughout trial and appeal, petitioner has insisted that he was due a separate trial.

The Court of Appeals recognized that petitioner was shown to be, at most, on the periphery of the charged conspiracy, and termed his, "involvement . . . ," as, "less extensive . . ." (Ap., p. 14a). Still, because the trial court had exercised undefined "sound discretion," *stare decisis* required no justification for producing before the jury which tried and convicted L. C. Cook the testimony of hundreds of witnesses wholly irrelevant to the guilt of L. C. Cook.

ARGUMENT

I

EXERCISE OF THE SUPERVISORY AUTHORITY OF THIS COURT IS NEEDED TO ESTABLISH UNIFORM STANDARDS AND GUIDELINES FOR THE FAIR ALLOTMENT OF PEREMPTORY CHALLENGES IN MULTIPLE-DEFENDANT TRIALS.

A. The Right to Exercise a Reasonable Number of Peremptory Challenges is Important in Securing to an Accused a Fair Trial.

"The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone, and repeated by Mr. Justice Story: 'In criminal cases, or at least in capital ones, there is *in favorem vitae,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause at all; which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. . . .'"

Lewis v. *United States,* 146 U. S. 370, 376, 36 L. Ed. 1011, 13 S. Ct. 136 (1892).

"The function of the challenge is not only to eliminate extremes of partiality on both sides but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions in voir dire and facilitates the exercise of challenges for cause by

removing the fear of incurring a juror's hostility through examination and challenge for cause."

Swain v. *Alabama,* 380 U. S. 202, 219-220, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965).

Every experienced trial attorney knows that the *voir dire* of the jury panel is of crucial importance. And every experienced trial attorney knows that many considerations come into play in rejecting prospective jurors other than those complaints which would constitute "cause."

Melvin Belli, in his work *Modern Trials* (Bobbs-Merril Co. 1954) Vol. I, Chapter VII, devotes a seventy-seven page chapter to "The Jury." Ben W. Palmer in his jury-selection chapter of *Courtroom Strategies* (Prentice Hall 1965), spends five pages discussing the peculiarities of women jurors. And Chapter 8 of Cone & Lawyer, *The Act of Persuasion in Litigation* (Dean-Hicks Co. 1966), is titled, "Psychological Factors in Jury Selection."

And, in Kuvin, *Trial Handbook* (Prentice Hall 1965) pp. 91-92, it is said,

". . . [T]here are many considerations, almost unanimously recommended that an attorney should not overlook. The economic status—the ethnic group or ancestry to which the person belongs—the fact that there does exist in almost all persons certain subconscious or unconscious prejudices—that persons of certain background and training react to certain situations and the manner of such reaction is of vital importance when considering prospective persons as jurors."

This Court, in the cases just cited and the authorities cited in those cases has consistently expressed its recognition of the importance of peremptory challenges:

> "'[T]here is nothing in the Constitution of the United States which requires Congress [or the States] grant peremptory challenges,' Stilson v. United States, 250 U. S. 583, 586, 63 L. Ed. 1154, 1156, 40 S. Ct. 28, nonetheless, *the challenge is, 'one of the most important of the rights secured to the accused,'* Pointer v. United States, 151 U. S. 396, 408, 38 L. Ed. 208, 214, 14 S. Ct. 410. *The denial or impairment of the right is reversible error without a showing of prejudice.*"
>
> *Swain* v. *Alabama, supra,* 380 U. S. at 219. (Emphasis added.)

B. Rule 24(b) of the Federal Rules of Criminal Procedure Establishes No Criteria to Secure Reasonably Uniform Fairness in Jury Selection in Multiple-Defendant Trials.

Rule 24(b) of the Federal Rules of Criminal Procedure (quoted in full *supra,* pp. 3-4) is hardly any rule at all relative to a trial of multiple defendants.

The Court below recognized this through its citation of Professor Wright (Ap., pp. 11a-12a):

> "'. . . The rules do not prescribe any particular method of exercising peremptory challenges and the practice varies widely from district to district regulated only by local rule or custom.' 2 Wright, Federal Pretice and Procedure: Criminal §387."

And the editors of A. L. R. feel similarly:

> ". . . Rule 24(b) is silent as to the manner in which peremptory challenges are to be exercised, and the result of this silence has been the formation of various informal rules of exercising them, which rules depend, apparently, largely on the taste of the individual judge involved." *Annot.:* "Number and Manner of Exercising Peremptory Challenges in Federal Criminal Trials Subsequent to Promulgation of Rule 24(b) Federal Rules of Criminal Procedure." 11 A.L.R. Fed. 713, 717.

No particular direction in the interpretation of this rule appears from the various rulings of the district and appellate courts.

For example, a district court in Minnesota allowed seven defendants a total of fourteen strikes and noted that it would allow more peremptories if they could show that any other prospective jurors were not qualified, fair or impartial (a direct contradiction to the philosophy of peremptory challenges discussed in the opinions of this Court cited above). *United States* v. *Kline,* 221 F. Supp. 776 (1963).

In the instant case, the Court below apparently deferred to the "sound discretion" of the trial court because the peremptories seemed to have been exercised informally (Ap., p. 11a).

The federal courts have done little or nothing to give recognizable, uniform shape to the equivocal Rule 24(b) when more than one man is charged by the sovereign. And no guidance has been given by this Court for establishing any uniform criteria to

insure that the individual members of a crowd are treated fairly at this stage of a trial.

If the right to peremptory challenges is as important as this Court has so often said it is and as important as all trial lawyers believe it to be, then it should be secured to every man who appears before the federal bench, whether he stands alone or in the midst of other accuseds.

C. The Method of Allotting Peremptory Challenges in the Instant Case Demonstrates the Need for Guidance From This Court to Secure in Reality the Right It has Stated to Be so Important.

As has been noted, in the selection of the trial jury below each defendant was allowed one peremptory challenge—a total of twenty-four strikes for "the defense." The government was given the right to exercise the six peremptory challenges called for by Rule 24(b) (Order of September 13, 1972). The trial court overruled petitioner's objections to this procedure.

Consider the offense charged: L. C. Cook and forty other persons (27 defendants and 13 co-conspirators), according to the grand jury, "combine[d], conspire[d] and agree[d] together and with each other . . ." to violate the law. If one is not guilty of such a charge then one is not a confederate (at least, within the bounds of the indictment) of his co-defendants. To treat him as such is tantamount to an assumption of his guilt. Defense to the charge of conspiracy necessarily entails disavowal of common purpose with those with whom one is accused of having conspired.

The trial court, in awarding twenty-four peremptory challenges to, "the defense," necessarily assumed nothing less than congeniality among the multitude. But the Court had no right to rely upon that assumption. Petitioner vigorously notified the Court that he and his defense were unrelated to and in conflict with his co-defendants.

The result of this ruling was mainfestly unfair to L. C. Cook, *vis-a-vis* the government and most of his co-defendants. One of the other defense counsel represented eight of the defendants (whose interest, it must be presumed, were not in conflict). Thus, for one common interest eight strikes were allowed. Another counsel represented nine defendants—thus, he had nine peremptory challenges toward a single goal. Two other counsel each had two strikes (Tr. O, Week of April 2, 1973, p. 1). Petitioner, through his trial attorney, had but one.

In short, of the total of thirty peremptory challenges allowed to the parties, twenty-nine were from participants who were at cross-purposes with L. C. Cook. The allowance of only one peremptory strike under such circumstances denied to this petitioner any effective voice in choosing the jury which tried and convicted him.

Perhaps extending to each of several defendants the ten strikes which a lone accused would receive might excessively burden the economy of our judicial system; but, surely, to allow the accused the same num-

ber as the accuser would not be unfair. See *Hayes* v. *Missouri,* 120 U. S. 28, 70, 30 L. Ed. 578, 580, 7 S. Ct. 350 (1886).

The words of this Court in *Kotteakos* v. *United States,* 328 U. S. 750, 772 (1946) (Ap., pp. 4a-5a) have been oft cited; but the substance of them seems to have been lacking here:

> "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application."

II

THE COURT OF APPEALS HAS SANCTIONED DEFAULT BY THE DISTRICT COURT OF ITS OBLIGATION TO CONTROL BOTH THE MANNER OF INSTITUION OF CRIMINAL PROCEEDINGS AND CONDUCT OF TRIAL.

A more extended description of the trial setting in the instant case is required to apprise the Court of petitioner's complaint here. For the courts of Western Kentucky, the trial was a marathon event.

For eight consecutive weeks during the spring of 1973 twenty-four defendants, their seven attorneys, thirteen co-conspirators, two prosecutors and their supporting staff, the regular court reporter and two special court reporters, the U. S. Marshal and no less than forty deputy and special-deputy marshals, the clerk and his staff, the judge and his staff, twelve jurors and six alternates, an untold number of special agents of the F. B. I. and other law enforcement officers, and hundreds of witnesses (only a small number of whom

testified regarding more than one defendant) were attendants to a single trial, expending money of the United States in Bowling Green, Kentucky. (From the Trial Orders, published accounts in the local newspaper and statements of the prosecutor.)

For eight consecutive weeks, except on weekends, the eighteen jurors were sequestered.

Yet, it is readily apparent from a review of the record (as noted before) that petitioner could have been tried alone in a single day (with a single defense attorney, a single prosecutor, no special deputy marshals, no sequestered jury, no rented theaters).

In the setting of this joint trial, however, L. C. Cook had no control over the responses to the government's charges. Each of the seven defense attorneys involved had his own clients' interests to assert, his own manner and tactics of defense, his own witnesses, his own issues to draw out on cross-examination, notwithstanding the danger of injury to another's client.

Petitioner does not describe this discomfort, in and of itself, as a reversible error (just as speeding, alone, cannot be correctly cited as the cause of a traffic accident). But the situation, from the start, was dangerous.

The indictment was drawn and this trial setting created by the prosecutor, the Assistant United States Attorney in charge of the case (Not the United States Attorney—unless things have changed a great deal in the years since this writer has left that office).

Petitioner objected strenuously to his joinder (by the Assistant U. S. Attorney, through the grant jury)

with the twenty-six other persons charged. But the government was never called upon to justify the joinder. (It did respond, however, by citing rote-oriented cases referring to the "sound discretion" of the trial court.)

The sound discretion of the trial court was never exercised on this issue. Tht court, without comment or request for explanation from the government, simply overruled the objections to the joinder. No *in camera* inquiry or review of evidence, as provided for in Rule 14 of the Federal Rules of Criminal Procedure was made. That is, the district court deferred to the "sound discretion" of the Assistant U. S. Attorney.

The court of appeals deferred to the sound discretion of the district court.

Through such default, the district court allowed itself to become overburdened with this marathon.

Of the seven trial counsel and their twenty-four defendants several were "in and out" during the trial, attempting to tend to other business while witnesses they felt—or hoped—were irrelevant to their cases testified (From the Trial Orders, all 8 weeks). Confusion arose early and remained throughout the trial. One attorney's tactic was often another attorney's complaint. See, Ap., p. 12a. And some defendants asserted willingness to testify in behalf of others if only they were not in the same trial at the same time.

At one point, about three weeks into the trial a government witness, Barry Lynn Clayton, an unindicted, immune co-conspirator, testified that a co-defendant

of petitioner, Billy Mayes, had once told him (Clayton). that the petitioner had told Mayes that he (the petitioner) was willing to buy a stolen car from him (Mayes). This confusing hearsay upon hearsay was admitted over vehement objections. It constituted a major part of the evidence presented against petitioner (Tr. Vol. 18, pp. 2818-2820).

After the close of the government's case counsel for L. C. Cook proposed to call the co-defendant Billy Mayes as a witness in petitioner's behalf for the expressly limited purpose of presenting to the jury his denial of any knowledge of or acquaintanceship with L. C. Cook. This proposal, with the expressed limitation, was agreed to by counsel for Mayes; and all other defense counsel agreed. But the government objected to the proposed limitation, so the trial court rejected the proposal and sustained the government's objection (TE Vol. 47, pp. 6639-45).

Counsel for Cook entered into the record his "avowal" that if Mayes was allowed to testify he would state that he did not know and had never seen L. C. Cook prior to the trial (TE Vol. 47, pp. 6639-45).

The trial court later sustained the objection of the government to proffered testimony by petitioner himself that Mayes had admitted to him, during a recess that he had never seen him before, because such testimony by Cook would be hearsay (TE Vol. 48, p. 6796).

In *Douglas* v. *Alabama,* 380 U. S. 415, 13 L. Ed. 2d 934, 85 St. Ct. 1074 (1965), the state prosecutor called to the stand the co-defendant (who had been tried, but was appealing) of Douglas. The co-defendant declined

to testify on self-incrimination grounds. But the prosecutor, under the guise of cross-examination, read to the jury a purported confession of the co-defendant, implicating (accusing) Douglas. Douglas was unable to cross-examine the co-defendant because he continued to refuse to testify. Law enforcement officers later took the stand and affirmed that the co-defendant had made the confession read by the prosecutor. The Court found this procedure unacceptable.

In the instant case the witness Barry Clayton was willing to testify, just as the law enforcement officers in *Douglas,* but the co-defendant who supposedly made the accusatory statement, as in *Douglas,* was not.

Even within the setting of the trial below the district court could have obviated this complaint by simply overruling the objection of the government (TE Vol. 47, pp. 6643-44) to the limited scope of cross-examination of the co-defendant Mayes and allowing him to testify only to the singular assertion of Clayton.

But these fundamental rights could have been better afforded to this appellant without prejudice to the United States. The presence of L. C. Cook at the trial below added nothing (except, perhaps, confusion) to the government's case against any other defendant. The cost for the jury and the attendants to the Court would have been less. And only the co-conspirator witnesses would have been required to make an extra trip for Cook's trial, and they were "kept" by the government anyway (See TE Vol. 8, pp. 1398-1400).

The trial judge in the instant case was well known as a learned, experienced and fair-minded jurist. But

he allowed himself to become overburdened with too many rights to protect simultaneously.

The court of appeals kept petitioner's appeal under advisement for over a year; but the record was so extensive that petitioner must speculate that it became difficult to consider "minor errors" in this long and tiring trial reversible, even though they might have been if presented by a lone appellant or brought up from a trial of just a few defendants.

There comes a point in the institution of charges against numerous persons together when control of proceedings by the court is lost, due simply to the large number of participants.

Guidance from this Court is needed in establishing standards or presumptions for the keeping of order in judicial proceedings through avoidance of crowds—and to assure us that we will not be lost in crowds.

CONCLUSION

> The history of liberty has largely been the history of observance of procedural safeguards.
>
> Frankfurter, J., *McNabb* v. *United States,* 318 U. S. 332, 347 (1943).

To be observed, procedural safeguards need, first, to be established. Petitioner calls upon this Court to consider and to establish standards of procedure to deal more effectively and fairly with the increasing

number of trials involving increasing numbers of participants.

Respectfully submitted,

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June 1975

APPENDIX

No. 73-1989

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee*

v.

L. C. COOK, - - - - - *Defendant-Appellant*

ORDER

Before: PHILLIPS, Chief Judge; LIVELY and ENGEL, Circuit Judges

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard en banc.

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore ORDERED that the petition for rehearing be denied.

Entered by Order of the Court

(s) John P. Hehman
Clerk

FILED
May 22, 1975
JOHN P. HEHMAN, Clerk

Nos. 73-1988 and 1989
Nos. 73-1990, 1991 and 1992

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1988
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BILLY MAYES, et. al.,
Defendants-Appellants.
No. 73-1989
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
L. C. COOK,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Kentucky.

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* * * * * * *

Decided and Filed February 25, 1975.

Before: PHILLIPS, Chief Judge, LIVELY and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. In this case, nineteen defendants appeal from judgments entered upon a jury verdict, in which they were found guilty of violating the federal criminal conspiracy statute, 18 U.S.C. § 371.[1] Their appeals

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[1]18 U.S.C. § 371 provides:

§ 371. Conspiracy to commit offenses or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United

(Footnote continued on following page.)

raise a number of issues, including whether the government proved a single conspiracy, the sufficiency of the evidence as to certain defendants, the propriety of the judge's jury instructions, peremptory challenge of jurors, severance, double jeopardy, and right of confrontation.

On August 15, 1972, a grand jury empanelled in the United States District Court for the Western District of Kentucky, returned an indictment, count one of which charged 28 persons with conspiracy to violate the Dyer Act (18 U.S.C. §§ 2312, 2313[2]). The indictment charged that the named defendants and thirteen others (named but un-

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States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

[2]18 U.S.C. § 2312 provides:

§ 2312. Transportation of stolen vehicles

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806.

18 U.S.C. § 2313 provides:

§ 2313. Sale or receipt of stolen vehicles

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806.

The remaining counts of the 25-count indictment charged individual defendants with substantive violations of the Dyer Act. Those counts were not tried below and are not a part of this appeal.

indicted) conspired to transport, receive, conceal, store, barter, sell and dispose of stolen motor vehicles, moving in interstate commerce. The multi-state stolen car operation was alleged to have been based in Kentucky, and to have involved activities in a total of at least ten states including Tennessee, Indiana, Ohio, Alabama, North Carolina, Arkansas, Georgia, Missouri, and Mississippi. The thirty-seven page indictment generally outlined the elements of the alleged illegal arrangement, and included in its original form a list of seventy-one overt acts allegedly taken in furtherance of the conspiracy.

On April 2, 1973, twenty-four of the named defendants came on for trial to a jury. One of the defendants, William Belvy Barbee, pled guilty during the trial, and another, Charlotte Mayes, was acquitted by direction of the trial judge at the conclusion of the government's proofs. On May 23, 1973, after eight weeks of trial, and consideration of the testimony of several hundred witnesses, the jury returned a verdict acquitting defendants Billy D. Miller, Charles Adams and Ronald Kinser, and finding the remaining nineteen defendants guilty as charged. They appeal.

In our review of a case involving so many individuals claimed to have participated in so many incidents covering a broad geographical area, it has been particularly necessary to examine the trial as a whole for any errors which might affect the fairness of the entire proceedings. Similarly, it has been necessary to examine closely the specific evidence which is claimed to support the conviction of each individual defendant. Thus, our review has included a complete examination of more than 9,000 pages of transcript, keeping in mind the admonition of Justice Rutledge in *Kotteakos* v. *United States,* 328 U. S. 750, 772 (1946):

> "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass

> application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass."

THE CONSPIRACY

The government alleged that the named defendants were all a part of a conspiracy wherein certain co-conspirators would either steal or cause to be stolen automobiles in the ten-state area.[3] In certain instances wrecked automobiles or parts thereof were purchased, the registration papers and other indicia of vehicle identification so obtained being then transferred to the similar stolen autos. The original identification of the stolen autos would then be destroyed or altered so as to provide a completely new and apparently legitimate identity to the stolen vehicles. In addition to such alteration and substitution, the conspiracy involved a complicated scheme to obtain false motor vehicle registration certificates and bills of sale.

The success of the conspiracy was largely due to the participants' ability to sell stolen cars which appeared, on all but the closest examination, to have been legitimately acquired and registered. Thus, the papers of a wrecked automobile as well as the forged papers purportedly issued elsewhere were presented to a county clerk to obtain new

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[3]Because of the factual complexity of the case, what follows is intended to be more illustrative than all-encompassing in spelling out the nature of the operation. In many facets, the circumstances here are similar to those reported in *United States* v. *Goble, et al.*, No. 73-1764-7 (6th Cir. decided and filed ————————, 1975).

and seemingly valid papers matching the numbers and description of the stolen vehicle. This was made possible by the decentralized nature of the Kentucky registration system, whereby registrations were issued out of each of some 35 different county clerks' offices. By constantly moving from county seat to county seat and appearing at rush hours, the possibility of detection was minimized. Further laundering was accomplished by having the newly created vehicle subjected to a vehicle safety inspection usually at the automobile agency of acquitted defendant Billy D. Miller, thus providing additional evidence of legitimate identification.

Evidence at the trial indicated that as many as 1800 stolen automobiles may have been involved during the period of the claimed conspiracy. Most proof at trial was confined to evidence of the overt acts included in the indictment, originally seventy-one, but later reduced to sixty-five.

Evidence as to each overt act generally included the testimony of the original owner, testimony regarding the particulars of the theft, followed by testimony by the ultimate and usually innocent purchaser of the stolen and altered vehicle. The chain of evidence of ownership was carefully presented through presentation of the certificates filed with the county clerks, and was then shown to be authentic or forged. Evidence was introduced, as to forged vehicles, showing that the serial number assigned was issued to the owner of a completely different automobile.

In this manner, the government took the jury step-by-step through the maze of facts which were to prove the overt acts and the existence of a conspiracy.

ISSUES ON APPEAL

While all nineteen appellants were tried together, four separate appeals were docketed, reflecting appellants' representation by four separate counsel or groups of counsel. To avoid repetition, while assuring careful attention to the claims of each individual, we have reorganized the issues and will treat, first, those of a general nature which could, if meritorious, affect the right of all defendants. We shall then proceed to those issues which are claimed to affect particular defendants.

I. COMMON ISSUES

A. Was more than one conspiracy shown?

It is claimed that the government failed to prove the existence of a single conspiracy of which all of the defendants were a part, but in fact proved two or more conspiracies, in consequence denying the defendants' right "not to be tried en masse for the conglomeration of distinct and separate offenses committed by others". *Kotteakos* v. *United States, supra,* at p. 775.

While we treat later in this opinion the question of the sufficiency of the evidence to connect each defendant with the conspiracy alleged, we conclude that the existence of a single conspiracy was in fact proved.

The government established the formation of a central organization, masterminded by such individuals as Billy Mayes, Shirley Basham and William Albert Hudson. It further proved that these leaders secured the services of car thieves, such as co-conspirator James Cecil Wilson, defendant William Henry Wilson, co-conspirator Claude Dillon and others. The interstate transportation of the cars, the forging and alteration of identification, and the fencing of the cars were proved. These activities were

shown to involve both the unindicted co-conspirators and the defendants.

While the government did not prove that each defendant knew or was involved with all of the activities of all other defendants, this is not an essential element of proving a single conspiracy. *United States* v. *Levinson,* 405 F. 2d 971 (6th Cir. 1968). Indeed in any large organization, legal or illegal, it is common for willing participants not to be acquainted with all of the members of the organization, or even to know the nature of every aspect of the operation. Nor does the fact that the conspiracy continued over a long period of time and contemplated the commission of many illegal acts transform the single conspiracy into several conspiracies. *Braverman* v. *United States,* 317 U. S. 49 (1942); *United States* v. *Goble, et al.,* No. 73-1764-67 (6th Cir. decided and filed _____, 1975). A conspiracy is completed when the intended purpose of the conspiracy is accomplished. But where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn. *United States* v. *Ethridge,* 424 F. 2d 951, 964 (6th Cir. 1970).

Appellants here, however, do not claim that the conspiracy ended and another began. They assert the existence of more than one conspiracy existing at the same time, arguing that the government has attempted to tack together several 'parallel' conspiracies. Viewing the evidence in the light most favorable to the government, *Ethridge, supra,* we conclude that the government succeeded in showing that the many acts occurring over a long period of time and involving many people were all a part of a single conspiracy. The conspiracy shown was quite long lived and very successful until it was detected. It spread over a large geo-

graphical area. It appears that because of the very success and widespread nature of the organization, defendants now claim that it was not one unified undertaking, but a series of disjointed and separate activities which might have enjoyed some commonality, but which lacked the essential continuity and singleness of purpose necessary to prove one conspiracy. We cannot agree. *United States* v. *Goble, supra.*

While not passing at this point upon the question of whether each of the named appellants was in fact a part of the conspiracy, we conclude, upon an examination of the entire record, that the evidence supported a conclusion by the jury that one continuous conspiracy was proved.

B. The Jury Instruction Generally

Common to all appeals here is the claim that the trial court's charge to the jury was, as described by one appellant, "so vague and nonspecific as to leave the battered and confused minds of the laymen who composed the jury in a state of confusion as to what they were to determine" and "lacked sufficient clarity and precision to enable the jury to perform its function of finding the relevant facts and applying law to them". It was further claimed that the instructions, which covered 113 pages of transcript, failed to protect the right of each defendant to an individual examination by the jury of his guilt or innocence. Finally, it was claimed that they did not make sufficiently clear that the defendants were on trial for conspiracy and not for any substantive offenses shown to have been committed by proof offered in support of the overt acts alleged.

The instructions were indeed long. They were repetitious, probably intentionally so, to impress upon the minds of the jury the importance of certain principles of law. The instructions were delivered in a colloquial fashion by an experienced judge who took pains to employ the "common

speech of man". *Downie, et al.* v. *Powers*, 193 F. 2d 760, 767 (10th Cir. 1951). The trial judge frequently employed the technique of explanation by way of illustration and example to heighten the meaning of difficult legal concepts.

Contrary to the assertion of the appellants, the court did emphasize that the charge was conspiracy and not auto theft:

> "This is not a charge of stealing automobiles; it's a charge that a conspiracy existed for the purpose of stealing them and transporting them in interstate commerce."

The trial judge also properly instructed the jury more than once that a conspiracy must first be proved before the jury could consider which, if any, of the defendants were a part of it. We also find that the trial judge was particularly sensitive to the danger of loss of individual identity and consequent guilt by association. He instructed the jury numerous times that guilt or innocence must be determined on an individual basis for each defendant. He instructed the jury on the law of conspiracy not only with technical accuracy, but as well followed the advice of Lord Bacon that "you should be a light to open their eyes, but not a guide to lead them by the noses."[4]

While the danger of confusion is indeed present in any case of this magnitude, we were impressed by the overall lucidity, balance and fairness of the trial judge's charge here. This charge was clearly not ambiguous and confusing to the point of plain error. Cf. *Bollenbach* v. *United States*, 326 U. S. 607 (1946).

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[4]Quoted by Judge Soper in The Charge to the Jury, 1 F.R.P. 540, 545 (1940).

C. Peremptory Challenges

Under Rule 24(b) of the Federal Rules of Criminal Procedure, a defendant or defendants are entitled to a total of ten peremptory challenges. It is further provided that "If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly".

Here, the trial judge allowed a total of twenty-four peremptory challenges to be exercised by the twenty-four defendants. Defendants-appellants urge that the trial judge abused his discretion in the manner in which he permitted the challenges to be exercised. The claims of the several groups of counsel on appeal are somewhat inconsistent. Counsel for defendant Billy Mayes and several others complains that the trial judge erred in requiring "that all attorneys for defense agree to the exercise of each of the twenty-four peremptory challenges granted to the defendant". On the other hand, counsel representing only one defendant, such as the attorneys of Ernest Frank Fowler and L. C. Cook felt themselves unfairly limited to a single peremptory strike.

The record reflects that the method employed in the exercise of the peremptory challenges was somewhat informal. Most challenges were exercised separately following a conference of the counsel. When the number of challenges remaining was reduced to three, difficulty did develop which was resolved by a mutual agreement to exercise those remaining in a joint manner.

In the selection of jurors, the district court is accorded a wide latitude of discretion. As Professor Wright has observed:

> "It is well established that the federal court is not bound to the particular method of selecting a jury that is required by state law, and where the subject is not

> controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court. The rules do not prescribe any particular method of exercising peremptory challenges, and the practice varies widely from district to district, regulated only by local rule or custom." 2 Wright, Federal Practice and Procedure: Criminal § 387

We find that the trial judge did not abuse his discretion in the application of Rule 24(b) in this case.

D. The Separate Trial Issue; Loss of the Right to Control One's Defense.

Throughout these appeals, it is contended that the court should have granted the several pretrial motions for severance made by the defendants. Appellants claim that because they were required to be tried en masse, they were prejudiced by evidence relating to some defendants and not to others, they were deprived of the right to control their own defense; and they were unduly burdened by the length and expense of the trial. Specifically, defendants Newberry and Crawley objected to testimony elicited by counsel for certain other defendants which implied that a threat and a demand for money had been conveyed to the defendant William Hudson by counsel for Max Bayer, an unindicted co-conspirator. Similarly, several defendants complain that they were prejudiced by the appearance of one Joseph Goldman who, when called by other defendants, was completely discredited as a witness in front of the jury.

Defendants Fowler and Cook complain primarily that their own alleged involvement in the conspiracy was at best peripheral and the proof relevant thereto could have been presented in a very short time. Thus, they claim, to have involved them in a trial of this length was an unfair and onerous burden upon their time and resources, subjecting

them to the dangers pointed out in *Kotteakos* v. *United States, supra:*

> "But as it [the conspiracy] is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater . . . At the outskirts they are perhaps higher than in any other form of criminal trial our system affords." 328 U. S. at 776

The decision of whether to grant a severance to co-defendants lies within the sound discretion of the trial court, *Opper* v. *United States,* 348 U. S. 84 (1954); *United States* v. *Goble, supra.* See also *Metcalf* v. *United States,* 195 F. 2d 213 (6th Cir. 1952); *Poliafico* v. *United States,* 237 F. 2d 97 (6th Cir. 1956). We note that the trial court did sever the conspiracy trial from the substantive auto theft charges as to all defendants. Thus these defendants fared better than those in *Poliafico, supra,* wherein eighteen defendants went to trial on both conspiracy and substantive counts.

Moreover, we are not persuaded that these defendants were prejudiced by the joint trial. The testimony to which Crawley and Newberry objected was impeachment testimony which backfired, but it was not inadmissible and its impact was reduced by the disavowals of their counsel at the time. Likewise, some of the individual defendants urge that severance of their trials would have spared them the expense and inconvenience of the longer trial. While this practical consideration merits our careful attention, it assumes that the prosecution was entitled to prove only the actual involvement of each defendant charged, and not the scope of the entire conspiracy. Whether the trials were joint or separate, the government could prove the entire scope of the conspiracy, though one defendant's role in it

was limited. We find no error in the refusal of the trial judge to grant any of the motions for a severance.[5]

II. SUFFICIENCY OF EVIDENCE

A number of defendants claim that even if the government has proved the conspiracy, evidence of their participation in it was insufficient to sustain conviction. While we have already held that the jury could properly have found the existence of a single conspiracy here, this of course does not dispose of the issue of sufficiency as to each defendant convicted. *Kotteakos, supra.* In reviewing for sufficiency of the evidence, we view the evidence in the light most favorable to the government. *Glasser* v. *United States,* 315 U. S. 60 (1942).

* * * * * * *

B. Tabor, Bewley and Cook.

Th involvement of defendants Fred Tabor, Lewis H. Bewley, and L. C. Cook was less extensive and has merited close scrutiny. We conclude, however, that under applicable law the extent of their involvement was sufficient for the jury to have found them to be a part of the conspiracy.

* * * * * * *

Discussion: It has been held that once a conspiracy has been established, only slight evidence is necessary to connect a defendant with it. *United States* v. *Chambers,* 382 F. 2d 910 (6th Cir. 1967); *Poliafico, supra.* We conclude that there was sufficient evidence to support a jury determina-

[5]One additional claim is raised as a common issue. Certain defendants claim that the trial judge should have permitted them to testify and to call other defendants to testify about certain aspects of the conspiracy, without waiver of their Fifth Amendment right not to respond to questions about the car thefts which were also the subject of the separate substantive counts of the indictment. On the record before us, we find this contention to be without merit.

tion that, beyond a reasonable doubt, these three defendants were connected with the conspiracy.

* * * * * * *

Both Bewley and Cook were shown to have knowingly purchased stolen vehicles from members of the conspiracy with knowledge of the conspiracy and its purposes. Indeed, Cook concedes this much. They claim that they were customers only, acting in their own individual interests, and cannot be held as conspirators. In *United States* v. *Ford,* 342 F. 2d 950, 952 (7th Cir. 1963), it was held that:

> "The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstance, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."

The Supreme Court has also held that "one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise *unless he knows of the conspiracy;* and the inference of such knowledge cannot be drawn merely from the knowledge that the buyer will use the goods illegally." *Direct Sales* v. *United States,* 319 U.S. 703, 709 (1943), interpreting its previous decision in *Falcone* v. *United States,* 311 U. S. 205 (1940) (emphasis added).

There was proof these defendants had a "prior or contemporaneous understanding of the conspiracy beyond the mere sales agreement". *United States* v. *Ford, supra,* at 952. Moreover, their knowledge of the conspiracy need not be inferred from mere knowledge of illegality (the stolen nature of the vehicles). *Direct Sales, supra.* L. C. Cook's

presence at a meeting of three of the leading co-conspirators when "stolen vehicles" were discussed, *prior* to his purchase, was a sufficient basis for a finding that he knew of the conspiracy and not simply that the truck he purchased was stolen. As to Bewley, testimony established that he knew far more than merely that his Volkswagen possessed a questionable pedigree. His conversation with Captain Higgins revealed that he appeared fully aware of the salient features of the conspiracy itself.

We conclude that there was evidence from which the jury could find that all three of these defendants knew of the existence and purposes of the Bowling Green conspiracy at the time of their alleged involvement. They benefited from it and they contributed to its success. This is sufficient.

III. ISSUES AFFECTING INDIVIDUAL DEFENDANTS

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B. L. C. Cook: Hearsay to establish conspiracy

Defendant L. C. Cook contends that hearsay evidence was erroneously admitted to connect him with the conspiracy and that his conviction should, therefore, be reversed. He asserts that a prima facie case of the existence of the conspiracy and his connection with it must be established independently of hearsay testimony admitted under the co-conspirator exception to the hearsay rule, relying upon *Glover* v. *United States,* 306 F. 2d 594 (10th Cir. 1962). He claims that such independent evidence was not presented, and that hearsay testimony of unindicted co-conspirator Barry Lynn Clayton was necessary to link him to the conspiracy.

Specifically, he objects to Clayton's testimony that Billy Mayes had told him that he, Billy Mayes, was going to drive the car to the residence of L. C. Cook . . . the po-

tential buyer of this altered vehicle. Clayton further testified that to the best of his recollection "Mr. Mayes said that L. C. Cook had ordered this car for the purpose of an insurance fraud".

We agree that a prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered as an admission of a co-conspirator. *South-East Coal Company* v. *Consolidation Coal Company,* 434 F. 2d 767 (6th Cir. 1970); *Carbo* v. *United States,* 314 F. 2d 718 (9th Cir. 1963), cited with approval in *South-East Coal, supra.* See also *Glasser* v. *United States, supra,* at 74. However, a prima facie case is less than proof beyond a reasonable doubt; indeed, it is less than a preponderance. *South-East Coal, supra,* at 779. Moreover, the prima facie case need not be established before the proffered hearsay may be admitted; the judge may admit it conditionally. It is sufficient if at the close of the government's proofs, a prima facie case of the conspiracy and the defendant's connection with it has been established by "independent or disassociated evidence". *South-East Coal, supra,* at 788.

While the hearsay evidence contained in Barry Lynn Clayton's testimony was relevant to the ultimate issue of whether defendant Cook had participated in the conspiracy, it was not the only evidence of that participation. Upon a review of the record, we conclude that the necessary prima facie case had been made by the government independent of Clayton's testimony. The admission of the challenged evidence was, therefore, proper.

* * * * * * *

CONCLUSION

In a trial of this magnitude, it is of course inevitable that some errors both in judgment and in law may have occurred, errors which in another trial might be cured only to be replaced by others as yet unknown. Our careful review of the entire record of this case, however, convinces us that there was sufficient and substantial evidence to support the jury convictions of each of the appellants, that the jury was fairly and fully instructed in the law, and that no reversible error intervened to deprive any of the defendants of a fair trial.

Affirmed.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

UNITED STATES OF AMERICA		
v.	}	No. 4218
L. C. COOK		

On this 24th day of May, 1973, came the attorney for the government and the defendant appeared in person and with employed counsel, E. R. Gregory.

IT IS ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY and a verdict of GUILTY of the offense of conspiring to commit an offense against the United States, that is, transport, receive, conceal, store, barter, sell and dispose of stolen motor vehicles which were moving in interstate commerce, in violation of Title 18, United States Code, Section 371, as charged in Count 1 of the twenty-five count indictment and the court having asked the defendant whether he or his attorney has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Presentence report was not available for the Court's consideration.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO

YEARS ON Count 1 and a fine of FIVE THOUSAND DOLLARS.

IT IS ADJUDGED that the defendant is given until June 4, 1973, to pay the fine and that the defendant shall not stand committed for the fine.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MAC SWINFORD
United States District Judge.

May 29, 1973

The Court recommends commitment to:

_____

(Signed) _____ *(By)* _____
Clerk. *Deputy Clerk.*

Supreme Court, U. S.
FILED
AUG 26 1975
MICHAEL RODAK, JR., CLERK

No. 74-1618

In the Supreme Court of the United States

OCTOBER TERM, 1975

L. C. COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1618

L. C. COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that hearsay evidence was erroneously admitted to link him with the conspiracy charged, that the trial court should have permitted a co-defendant to give exculpatory testimony without waiving his privilege against self-incrimination, that the trial court erred in refusing to grant him a separate trial, and that the court abused its discretion in allowing the twenty-four co-defendants a total of twenty-four peremptory juror challenges.

After a jury trial with 23 co-defendants in the United States District Court for the Western District of Kentucky, petitioner was convicted of having conspired[1] to transport,

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[1]The indictment named an additional thirteen persons as unindicted co-conspirators.

receive, conceal, store, barter, sell and dispose of stolen motor vehicles moving in interstate commerce, in violation of 18 U.S.C. 371, 2312, and 2313.[2] He was sentenced to imprisonment for two years and fined $5,000. The court of appeals affirmed (512 F.2d 637). (On June 16, 1975, this Court denied co-defendants' petition for a writ of certiorari (*Billy Mayes, et. al.* v. *United States*, No. 74-1224).)

The facts are adequately set forth in the opinion of the court of appeals and may be summarized as follows. Petitioner and others (some of whom testified for the government at trial) were part of a conspiracy to steal or arrange for the theft of automobiles in a ten-state area. The conspirators would steal automobiles and switch the ownership papers of the stolen cars with those of wrecked automobiles, transferring the registration papers and other vehicle identification from the wrecked to the stolen automobiles.[3] The stolen automobiles, now carrying impeccable credentials, would be driven to other states and sold to unsuspecting buyers. The evidence at trial indicated that as many as 1,800 vehicles may have been stolen during the course of the conspiracy. (Pet. App. 5a-6a.)

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[2]Eighteen co-defendants (Billy Mayes, William Hudson, Shirley Basham, Fred Tabor, Jimmy Thompson, Hubert Harrison, William Houk, Nathan McDaniel, Larry Gann, Larry Suddeth, James Dennison, James Hendricks, Carroll Pemberton, Lewis Bewley, Larry Osborne, Ernest Fowler, Chester Crawley, and James Newberry) were also convicted as charged. Three defendants (Billy Miller, Charles Adams, and Ronald Kinser) were acquitted by the jury. Charlotte Mayes was acquitted by the court at the close of the government's case. William Barbee pleaded guilty during the trial. Two defendants were fugitives at the time of trial.

[3]The conspirators took advantage of the decentralized Kentucky registration system, under which registration certificates are issued by 35 different county clerks' offices. Papers of wrecked automobiles, as well as forged papers purportedly issued in other states, were presented to county clerks to obtain new and seemingly valid papers matching the numbers and descriptions of the stolen vehicles. The conspirators moved from clerk's office to clerk's office and appeared at rush hours to decrease any chance of detection. (Pet. App. 5a-6a.)

The conspiracy was carried out under the overall direction of co-defendants Mayes, Basham, and Hudson. Defendants Houk, Gann and others were the car thieves; Dennison and Fowler transported the stolen cars to other states; Harrison, Hudson and Dennison altered the identification numbers on the stolen vehicles; Hendricks and Osborne made out the fictitious title certificates for the stolen vehicles; petitioner and Bewley received the cars prior to their disposal; and Hudson, Basham, Newberry, Crawley, Hendricks, Pemberton, Fowler, Thompson, and Suddeth sold the stolen cars to innocent consumers or used car dealers in other states.

The government's proof directly linked petitioner with two of the stolen vehicles. A 1969 Chevrolet pick-up truck, which had been stolen in Indianapolis, Indiana, was subsequently discovered in petitioner's possession in Louisville, Kentucky, with an altered serial number plate, and with a new motor number that petitioner had installed and that further disguised the vehicle's true indentity (Tr. 2325-2326, 2329, 6755). Petitioner testified that he had bought the truck for $1,490 in cash from a total stranger whom he never saw again and who did not give him a receipt (Tr. 6810). Max Bayer, an unindicted co-conspirator, testified that he overheard petitioner and defendants Basham and Hudson discussing stolen pick-up trucks in a restaurant in Bowling Green, Kentucky (Tr. 1693, 1695, 1697-1698).

The second stolen vehicle tied to petitioner was a 1970 Chevrolet automobile. The government presented evidence that permitted the jury to infer that petitioner placed an "order" for the Chevrolet to be stolen, registered and insured the stolen car in his sister's name, obtained $2,700 by using it as collateral for a loan, and arranged for it to be restolen.

The car was originally stolen in Louisville by co-conspirator C. W. Marcum and delivered in Bowling Green to defendant Billy Mayes, on whose instructions Marcum was acting (Tr. 2687-2690, 2702-2705). Co-conspirator Barry Clayton testified that Mayes told him that petitioner had "ordered" the car stolen for purposes of insurance fraud and wanted it restolen by Mayes and his confederates (Tr. 2820-2821).

Defendant Harrison altered the Chevrolet's vehicle identification number, using the number from a wrecked car (Tr. 2817). Clayton and defendant Dennison then drove the stolen car to a location in Bowling Green, following Mayes in his own car. Mayes then drove the stolen Chevrolet away, while Clayton and Dennison waited in Mayes' car (Tr. 2818). Mayes returned in another car driven by petitioner (Tr. 2827-2828, 2837-2839).

Petitioner subsequently co-signed with his sister a $2,700 bank note for which the stolen car was used as collateral (Tr. 2788). As prearranged, Clayton and Dennison later restole the vehicle (Tr. 2823-2824). After the theft was reported, the insurance company paid off the bank loan (Tr. 2788-2791). The conspirators dismantled the Chevrolet and converted it to salvage (Tr. 2824-2825). Their purpose in restealing and disassembling the car was to prevent discovery of its stolen origin (Tr. 905-906).

1. Clayton's testimony that Billy Mayes told him that petitioner had "ordered" the Chevrolet stolen was properly received into evidence under the exception to the hearsay rule for declarations by co-conspirators acting in furtherance of a conspiracy. See, *e.g.*, *Krulewitch* v. *United States*, 336 U.S. 440. As the court of appeals held (Pet. App. 17a):

> * * * [A] prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered as an admission of a co-conspirator.
>
> * * * * *
>
> While the hearsay evidence contained in Barry Lynn Clayton's testimony was relevant to the ultimate issue of whether defendant Cook had participated in the conspiracy, it was not the only evidence of that participation. Upon a review of the record, we conclude that the necessary prima facie case had been made by the government independent of Clayton's testimony. The admission of the challenged evidence was, therefore, proper.

Petitioner sought unsuccessfully to call co-defendant Mayes as a defense witness to refute Clayton's testimony about Mayes' remarks implicating petitioner. Counsel for Mayes told the court that Mayes would be willing to testify for that limited purpose if he could do so without waiving his Fifth Amendment right not to respond to questioning on cross-examination (Tr. 6639-6645). Petitioner argues (Pet. 17-18) that his Sixth Amendment right to confront Mayes was abridged when the trial court sustained the government's objection to such a limitation of the prosecution's right to cross-examine and Mayes consequently refused to testify.

The court of appeals (Pet. App. 14a, n. 5) properly rejected that contention. Petitioner cites no precedent for such a procedure, which would permit co-defendants to testify in each other's behalf without subjecting themselves to the full truth-testing rigors of cross-examination. The trial judge could not have fairly permitted Mayes to take the stand and deny his acquaintance with petitioner without allowing the government to cross-examine him regarding all aspects of his involvement in the conspiracy.

In effect, petitioner contends that admission of hearsay declarations of co-defendants in joint trials violates the Confrontation Clause of the Sixth Amendment where the co-defendant-declarant refuses to testify on Fifth Amendment grounds. However, the exception to the hearsay rule for declarations of co-conspirators made in furtherance of a conspiracy and the applicability of the exception in joint trials have long been recognized by this Court.[4] See, *e.g., Krulewitch, supra*; *United States* v. *Nixon*, 418 U.S. 683, 701. Indeed, conspiracy trials by their very nature involve multiple defendants, and the admission into evidence of hearsay declarations by co-defendants who decline to take the stand in their own defense routinely occurs. *Douglas* v. *Alabama*, 380 U.S. 415, cited by petitioner, is not in point since it involved the introduction into evidence of a co-defendant's *confession*—not a hearsay declaration by a co-defendant acting in furtherance of a conspiracy.

2. Petitioner asserts that because his involvement in the conspiracy was peripheral, the trial court erred in refusing to grant his pretrial motion for a separate trial. The decision whether to grant a severance lies within the sound discretion of the trial court and, as the court of appeals held (Pet. App. 13a), petitioner was not unduly prejudiced by the joint trial. As the court of appeals noted (Pet. App. 13a-14a), "the trial court did sever the conspiracy trial from the substantive auto theft charges as to all defendants" and "[w]hether the trials were joint or separate, the government could prove the entire scope of the conspiracy, though one defendant's role in it was limited."

Additionally, petitioner now suggests (Pet. 18) that the trial court should have granted a severance to permit him to call co-defendant Billy Mayes as a witness. But there is

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[4]This principle is codified in Rule 801(d)(2)(E) of the Federal Rules of Evidence.

no reason to assume that a severance would have enabled petitioner to obtain Mayes' testimony, since Mayes would presumably have continued to invoke his privilege against self-incrimination.

3. Under Rule 24(b), Fed. R. Crim. P., a defendant or defendants are entitled to a total of ten peremptory juror challenges in a non-capital case. The Rule further provides that "[i]f there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." Here the trial judge, in his discretion, granted fourteen additional challenges, which allowed the twenty-four defendants a total of twenty-four challenges. As recounted in the opinion of the court of appeals (Pet. App. 11a), the method employed in exercising the peremptory challenges was somewhat informal. Most were exercised separately following a conference of defense counsel. When the number of challenges was reduced to three, counsel agreed to exercise those remaining in a joint manner.

Petitioner claims that because the number of challenges equaled the number of defendants he was unfairly limited to a single peremptory strike. However, as the court of appeals held (Pet. App. 11a-12a), "[i]n the selection of jurors, the district court is accorded a wide latitude of discretion" and "the trial judge did not abuse his discretion in the application of Rule 24(b) in this case." Indeed, the defendants received more than twice the minimum of ten challenges they were entitled to under Rule 24.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[5]On the other hand, the prosecution was granted only six peremptory challenges.